

APPLICANT:
Chun Liu

REQUEST: A special exception to allow a
Personal Care Boarding Home and variance
for the use to be in a non-conforming building

HEARING DATE: March 24, 2004

BEFORE THE

ZONING HEARING EXAMINER

FOR HARFORD COUNTY

BOARD OF APPEALS

Case No. 5402

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Chun Liu

LOCATION: 624 Country Club Road/Oakington Manor, Havre de Grace
Tax Map: 59 / Grid: 1E / Parcel: 0170 / Lot: 27
Sixth Election District

ZONING: R1 / Urban Residential/LDA/Limited Development Areas

REQUEST: A special exception pursuant to Section 267-53F(8) of the Harford County Code to allow a Personal Care Boarding Home, and a variance, pursuant to Section 267-20A(1) to allow a use in a non-conforming building to be changed to a use of a greater intensity in an R1 District.

TESTIMONY AND EVIDENCE OF RECORD:

First testified the Applicant, Chun Liu. Mr. Liu identified himself as the owner of the subject property, having owned that property for about twenty (20) years. He and his wife live at the subject property. Mr. Liu also has an apartment in Washington D.C.

Mr. Liu indicated the lot is approximately one-half (½) acre. Mr. Liu identified a series of photographs showing various views of his home. These photographs were accepted and marked as Exhibits 10-A through 10-G. Mr. Liu also identified a diagram of the first and second floors of his home. The home has five (5) bedrooms and two (2) bathrooms on these two floors.

Mr. Liu wants to be able to care for, at most, five (5) individuals. He feels his residence is adequate for five (5) residents. These individuals will each be over the age of sixty-five (65). Some will have trouble with every day activities and will require assistance. He and his wife would take care of these people and give them what they need. He is anxious to assist individuals who cannot help themselves. He would not accept individuals with drug or alcohol dependencies.

Case No. 5402 – Chun Liu

The Applicant would hire one full-time weekday person and one part-time person for weekends. Mr. Liu's wife will be there full-time. Mr. Liu will be there part-time.

Mr. Liu's operation will be subject to review and approval by the State Office of Health Care Quality, Department of Health and Mental Hygiene. However, one condition of State approval is that Mr. Liu obtain this zoning approval.

Mr. Liu feels that few of the residents will be able to drive. He can accommodate eight (8) parking spaces on his property. He does not believe that many will be necessary. His property is served by a well. The water quality and quantity has been tested and is acceptable. He will comply with all recommended conditions of the Department of Planning and Zoning.

On cross-examination, Mr. Liu testified that while he lived part-time in Washington D.C., he comes home at least three (3) nights per weeks. He lives at both the subject property and in Washington D.C. He does not remember if he ever told anyone that he does not live on the subject property full-time.

Mr. Liu is not aware if private covenants and restrictions are applicable to his property. He was shown a document which he identified as the Deed to his property. Mr. Liu admitted that the zoning enforcement office had been to his house on prior occasions.

Mr. Liu also testified that he owns a contracting company and stores some construction material in the back yard of the subject property. He applied for and was granted a permit for the storage shed located in his back yard.

Mr. Liu, continuing on cross-examination, admitted that he was back and forth to Washington D.C. His Washington D.C. business is a small construction business, primarily furnishing laborers to contractors. He stated that books and furniture are stored in the shed on the subject property. He also has a storage shed on his property.

Next in support of Mr. Liu's application testified Ms. Doris Bittings, who resides at 622 Country Club Road, next door to the subject property. Ms. Bittings has lived at her property for twenty (20) years, and she has known Mr. Liu for twenty (20) years. She understands he has been in China for a while. She understands he works in Washington D.C. Ms. Bittings testified that Mr. Liu returned home periodically from Washington D.C.

Ms. Bittings has no objection to Mr. Liu's request that he be allowed to operate a personal care boarding home, provided it follows applicable guidelines and has a security system so that occupants cannot wander out of the house and around the neighborhood. She also expressed concern about the value of her property. She does not wish it to go down. Ms. Bittings otherwise has no objection to the proposed use. She believes that Mr. Liu has been able to address any problems which have come up concerning his property.

Case No. 5402 – Chun Liu

On cross-examination Ms. Bittings indicated that over the last three (3) months she had been collecting Mr. Liu's mail for him. However, he has been on the property off and on for the past two (2) weeks.

Mr. Liu was then recalled. Mr. Liu testified that he will provide a security system, and that in fact that system is required by regulations. The doors will be alarmed and will be activated when the door is opened from either the inside or outside. Lights will be governed by a photo sensor and will not shine on neighbors' lawns.

Next testified Anthony McClune of the Harford County Department of Planning and Zoning. Mr. McClune and the Department have reviewed the application. The subject property meets the minimum lot size requirements. One boarder per 2,000 square feet is Code requirement. The Applicant more than meets this requirement.

The Department has found that there exists adequate off-street parking. The Department recommends a minimum of five (5) parking spaces be provided - two (2) in the garage and three (3) additional spaces outside the garage. Parking cannot obstruct the garage. There appears to be adequate room on the property to provide these parking spaces.

Mr. McClune stated that no exterior renovation will be necessary in order to meet development regulation requirements.

The Applicant also asked for a variance. Mr. McClune indicated that the house was originally constructed by a valid permit; however, it is now 3 feet closer to the side yard than required (15 feet is required; the house is only 12 feet away from the side yard). Mr. McClune indicated it has been like that since at least 1970.

Accordingly, Mr. McClune stated that house is non-conforming on Ms. Bittings's side. By visual inspection it is impossible to tell how close the lot is to the property line. Vegetation exists in that area and one cannot determine the property line.

Mr. McClune also indicated that Mr. Liu can meet all the requirements of Section 267-9I. The Department has determined that this is an appropriate use in this district as a special exception. There will be no greater impact at Mr. Liu's location in this district than there would be if it were located somewhere else in the district. The Department and Mr. McClune also feel there would be no adverse impact on the road system.

The Department accordingly recommends approval based on four conditions:

1. A site plan is to be reviewed by DAC.
2. Three (3) additional parking spaces be provided (in addition to the two in the garage). Parking must be paved.
3. Five (5) boarders maximum on the property.
4. The permit is to be for the Applicants' use only.

Case No. 5402 – Chun Liu

On examination by Applicants' counsel, Mr. McClune indicated that a half (½) acre lot is a typical size in an R2 district. The minimum side yard setback in an R2 district is 10 feet. The subject property was originally zoned A-1 when the house was built in 1978. The Personal Care Boarding Home statute was enacted in 1982, after the construction of the house.

Mr. McClune was then questioned by counsel for the opponents.

Mr. McClune testified that he understood Mr. Liu and his wife reside in the dwelling. He understood that Mr. Liu and his wife want to give back to the community by taking in boarding home residents. Mr. Liu never told Mr. McClune that Mr. Liu was living in Washington D.C. This was interesting information, but Mr. McClune does not know if it would have changed his opinion or the opinion of the Department. Mr. McClune did not consult with the Health Department concerning the Department's recommendation. Mr. Liu's property is in the Chesapeake Bay critical area, with a designation of limited development area (LDA). The property is located at the head waters of the Chesapeake Bay. Mr. McClune indicated that the Department did not base its recommendations on private covenants and restrictions. It based its' recommendations on County Development Regulations.

Next in opposition testified Robert Steidle, the neighbor who lives next door to Mr. Liu. Mr. Steidle was not originally opposed to the request, although he now is. He opposes the variance. Mr. Steidle testified to an earlier problem he had with Mr. Liu's use of his property. Mr. Liu operated a "rent-a-wreck" business from his property in 1992. His yard was full of vehicles. Customers were coming day and night. He was subsequently ordered by zoning to stop. Mr. Steidle testified that Mr. Liu continued to operate his business for an extended period in 1992. Mr. Steidle does not believe Mr. Liu has been living at his property.

On cross-examination, Mr. Steidle indicated that he had owned his property for five (5) years although he lived there since 1972. Mr. Steidle's opposition is based on his prior experience with Mr. Liu. He also worries that the residents of the personal care boarding home may also wander around the neighborhood and come onto Mr. Steidle's property. Mr. Steidle also stated there are at present people sixty-five and older living in his subdivision.

Mr. Steidle then indicated he has no personal knowledge of planning and zoning issues; only what he had learned from other people. Mr. Steidle then indicated that Mr. Liu has not lived at his property although he may have stayed there on occasion. He does not spend at least half his time there.

Next in opposition testified Adrian Earnshaw of 908 Country Club Road. Ms. Earnshaw indicated that she had contact Mr. Liu about a year ago. Mr. Liu's house was looking vacant and Ms. Earnshaw inquired if it were for sale. Mr. Liu indicated that he did not live there he lived in Washington D.C. However, Mr. Liu said his wife loved the house and she would not agree to sell it.

Case No. 5402 – Chun Liu

Next in opposition testified Diana Coates of 716 Country Club Road. Ms. Coates is familiar with Mr. Liu's house, driving by it often. She opposes the application. Ms. Coates is a registered nurse, and has worked for twenty-four years as a nurse, with experience in geriatric care. She feels the uniqueness of the neighborhood must be considered. There is a golf course which is located across the street; Mr. Liu's property is located on the water in the Chesapeake Bay Critical Area; and the neighborhood is a very close knit community.

Ms. Coates has taken care of older people and feels she has specialized knowledge in care of the elderly. She questions the adequacy of the care as proposed by Mr. Liu. These people need special laundry service; the well and septic may be overloaded; traffic may be an issue of people coming and going; and the use is not conducive to a residential area.

Next testified Jonas Seeberg of 616 Country Club Road. Mr. Seeberg opposes the request. Mr. Seeberg has experience with geriatric issues. His experience with personal care boarding homes is that they degrade the value of the surrounding residences. The boarders are often incontinent and insane. He does not want these people in his neighborhood, potentially bothering his children.

Mr. Seeberg is afraid that people leaving the personal care boarding home and walking around the neighborhood will be an inconvenience and potential problem to the neighborhood. He believes that larger, more structured facilities are the more appropriate residences for these individuals. More services are available and better care is given. He is against small homes being used as personal care boarding homes.

Next testified Alfred Krause, a resident of Country Club Road. Mr. Krause testified that the Liu property has never been well maintained. There has always been dead grass around the house. It is one of the smallest homes in the subdivision.

Beginning about a year ago Mr. Krause began to see oriental people around the house. They were different people, shy, who would not speak. He saw them coming out of the trailer behind the house, and coming out of the house itself. He believes some people live in the house; he also thinks some people lived in the trailer.

Mr. Krause said the "rent-a-wreck" business was on the property for about a year. He did not know Liu's reaction to the zoning department violation notices.

Mr. Krause is opposed to the requested use. He must comply with the covenants and restrictions of the neighborhood and expects Mr. Liu to do so as well.

Mr. Krause also questioned Mr. Liu's veracity and trustworthiness.

Next testified William Murphy, a resident of Country Club Road. Mr. Murphy has lived at his property since 1992, and is able to see the Liu property from his property. Mr. Murphy has not seen Mr. Liu since Mr. Murphy moved to his property. The evening of the hearing is the first time he had ever seen Mr. Liu.

Case No. 5402 – Chun Liu

A vehicle at Mr. Liu's property has not moved since the year 2001. He would often see people around the property, coming out of the storage trailer to the rear. They have come out in the morning, get into a van, leave, and then come back in the evening. Sometimes these people would wander around and come onto his deck. They appeared to be living in the trailer/shed to the back of the property. A light was on in the trailer/shed. People could be seen inside. Mr. Murphy feels that Mr. Liu will have trouble taking care of his residents since he is not able to take care of his house at the present time.

Mr. Murphy has been watching the house. He has seen no movement for at least two weeks. He has gone to the door and knocked. There has been no response. Mr. Murphy identified a series of photographs of the Liu property marked Protestants Exhibit 1 - 5.

Next in opposition testified James Knopt, who identified himself as a retired military person. Mr. Knopt indicated that he goes for walks in the neighborhood, and tended to watch things in the neighborhood. The Liu house has been, for the most part, vacant for a year or so. Mr. Knopt feels that elderly people require a lot of care and he doesn't think that Mr. Liu will be able to take care of these people. This subdivision is a quiet bedroom community. The proposed use is inappropriate.

Next for the protestants testified Roger Mainster, offered and accepted as a real estate appraiser/broker. Mr. Mainster testified that he does not sell many residential homes. He is familiar with commercial property. Mr. Mainster testified that the proposed use, if granted, would generally devalue those properties in close proximity.

Mr. Mainster testified that the septic system on the property included a 1,000 gallon concrete tank. The depth of the percolation test on the property was 18 feet. The septic system is old.

Mr. Mainster was of the opinion the house was not properly cared for. He based his opinion on mold on the front of the house, sidewalk was broken, the garage doors did not match. He also stated, as a further basis of his opinion, that there would be increased traffic which would tend to devalue the property in the neighborhood as well. Mr. Mainster concluded and stated that 'the use is inconsistent with the character of the neighborhood, used as a business use in a residential neighborhood.'

Next in opposition testified Patricia Vandray. She rarely sees anyone at the Liu property. She is worried about elderly people being able to get proper medical treatment. Furthermore, the Liu property, as other homes in the subdivision, has a difficult access to and from Route 40 because of the small bridge on the access road.

A number of individuals, residents of the Oakington Manor Subdivision, then stood and were identified. Each of these individuals indicated he or she was in opposition of the proposed request.

Anthony McClune was then re-called. Mr. McClune described the development review process. At that time the Health Department as well as other county agencies will review the request. Access issues would also be looked at that time.

Case No. 5402 – Chun Liu

Mr. Liu then was questioned about the improvements on the subject property. He identified the trailer/shed to the rear of the house which contains clothing, books, and files. He identified another shed to the rear of the house which contains furniture, clothing, Christmas tree, vacuum cleaner, tools. He identified another shed closer to the rear lot line of the property which is also used for storage.

APPLICABLE LAW:

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

“Variances.

- A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
 - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*
 - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

The Applicant is requesting a special exception to Section 267-53F(8) of the Harford County Code which states:

- “(8) Personal Care Boarding Homes. These uses may be granted in the AG, RR, R, R1, R2, R3, R4, RO, VB, and VR Districts, provided that:*

Case No. 5402 – Chun Liu

- (a) *The proposed use shall be located in a single-family detached dwelling.*
- (b) *The proposed use meets the minimum lot size requirements for a conventional single-family residence in the district where located.*
- (c) *A maximum density of one (1) boarded per two thousand (2,000) square feet of lot area shall be maintained.*
- (d) *Adequate off-street parking shall be provided.*
- (e) *Where an application is for construction of a new dwelling, the building shall be similar in appearance to other single-family dwellings in the neighborhood.”*

The Applicant is requesting a variance to Section 267-20A(1) of the Harford County Code which states:

- “(1) If no structural alterations are made, a nonconforming use of a building may be changed to similar or more-restricted use of the same or lesser intensity.”*

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicant’s five (5) bedroom home is located in the Oakington Manor subdivision, situated on the west side of Country Club Road and across from Swan Creek Golf Club. It backs up to Swan Creek, a tributary of the Chesapeake Bay. The Oakington Manor subdivision is zoned R1 / Urban Residential. Mr. Liu’s house, which is somewhat smaller than other homes in the subdivision, is a brick and frame two story dwelling with attached two car garage and concrete driveway. The property is accessed by Country Club Drive, which requires the passage over a small bridge. The Applicant requests special exception approval and side yard variance, if necessary, to allow the use of his home as a personal care boarding home.

Many neighbors in the area expressed their general opposition to Mr. Liu’s request, which would allow him to board and give care to up to five (5) individuals.

While attempts were made to argue that Mr. Liu has committed zoning violations and ignored enforcement efforts in the past, there is no authority to judge Mr. Liu’s application on the basis of what he has or has not done in the past with regard to such unrelated issues. Furthermore, while an argument was made that Mr. Liu may have violated private covenants and restrictions, the Hearing Examiner also has no authority to consider those alleged violations. Accordingly, those arguments will not be considered.

Case No. 5402 – Chun Liu

The proper question is whether the proposed use, i.e., the conversion of a single family dwelling into a personal care boarding home and the continued operation of such, would have a greater impact at this location than at any other within the zone. In order to answer this question not only must the characteristics of the surrounding neighborhood, as generally summarized above, be examined, but also the particular characteristics, if any, of the Liu property.

A personal care boarding home, if it is to be approved, must be located in both a single family detached dwelling and meet the minimum lot size requirements for a conventional single family dwelling. A necessary element of the minimum lot size requirement is that a 15 foot side yard setback be maintained. Mr. Liu's property has only a 12 foot side yard setback, and accordingly cannot meet the minimum setback requirement. It is, in fact, non-conforming by current Development Regulations.

Because of the Applicant's failure to meet minimum lot size requirements, the Department of Planning and Zoning suggests, and the Hearing Examiner agrees, that the applicable section is 267-20(A)(1), which;

“ . . . prohibits a non-conforming use of a building . . . (being) . . . changed to a similar or more restricted use of the same or lesser intensity.”

The use, being non-conforming, cannot be changed to a more restricted use as a matter of right. A personal care boarding home is clearly a more restricted use than is a private dwelling. Among other characteristics, a personal care boarding home can only be granted as a special exception while a private dwelling is a principal permitted use.

Accordingly, the request must be denied unless a variance to the applicable setback request is granted.¹

The standard which governs requests for a variance is contained at Section 267-11 of the Harford County Development Regulations. The literal enforcement of the Code must result in a practical difficulty or unreasonable hardship; “. . . by reason of uniqueness of the property or topographical conditions. . .” This involves at least a two step process.

¹Applicant's counsel relies upon Maryland Annotated Code, Courts and Judicial Proceedings Article, Section 5-114 as authority for his argument that no setback variance is necessary. Courts Article, Section 5-114 states; “A person may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than three years after the date on which the violation first occurred.”

This section of the Maryland Annotated Code, appears to be a general statute of limitations on private actions to enforce setback restrictions. No violation action is being brought against the Applicant. Section 5-114 does not affect the finding that this particular aspect of the Liu property is non-conforming, nor does it affect the Applicant's burden in this case.

Case No. 5402 – Chun Liu

“The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is – in and of itself – unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e., a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property’s uniqueness, exists.”

See Cromwell v. Ward, 102 Md. App. 691 (1995).

Mr. Liu can make neither showing: he demonstrates neither uniqueness nor practical difficulty resulting from a disproportionate impact of the setback requirement.

The subject property has no unusual topographical conditions, no subsurface characteristics, no adjoining property encroachments, none of the other characteristics which could be the basis for a finding of uniqueness as discussed by Cromwell v. Ward. Applicant’s property is, indeed, a fairly flat half acre lot which borders a subdivision street, is accessed through a subdivision, and backs up to a tributary of the Chesapeake Bay. His house is similar to others in the subdivision, and has been, and is, used as a private dwelling. There was no testimony or evidence that it is, in any way, significantly different from any other home in the area. The non-conforming setback causes no impact on Mr. Liu’s ability to use the property for principal permitted uses.

In short, there is no unusual characteristic of the property which would cause a disproportionate impact upon it by the Development Regulations. The property can be used as a home with allowable accessory uses. In fact, Mr. Liu has taken abundant advantage of his ability to locate accessory uses on the property by erecting at least two storage sheds, one of which has permanent electric service.

Furthermore, even if a unique factor could be found, there is no ascertainable resulting practical difficulty which would be suffered as a result by Mr. Liu. The house is, as discussed, used as a principal dwelling. There is no apparent limitation to the accessory uses which Mr. Liu can make of his property. He suffers no identifiable practical difficulty or unusual hardship other than not being able to make the use he wants to make of his property, i.e., encroaching into the setback in order to meet necessary conditions for a personal care boarding home. The Applicant cannot make the required showing of uniqueness merely by asserting that the property is unique because the Applicant cannot do what he wants to do. See Chesterhaven Beach v. Board of Appeals, 103 Md. App. 324 (1995).

Case No. 5402 – Chun Liu

Furthermore, assuming, arguendo, that the variance standard is met, the request for special exception must nevertheless be denied. Mr. Liu's dwelling would be located 3 feet closer to his adjoining property owner by virtue of his non-conforming encroachment into the setback. The dwelling would be used to give care to up to five (5) resident individuals. Visitors would be coming to the property; employees would be on the property; parking would be increased; Mr. Liu and his wife would also live there. These activities, among others, would cause the requested personal care boarding home to have a different and more intensive impact because it is located closer to the adjoining property line than is otherwise allowed. The special exception...

“ . . . shall be denied (where) there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone . . . ”

See Schutz v. Pritts, 291 Md. 1 (1981).

The adverse impact of such a use on the neighboring property will be greater than that inherently associated with the use because of the reduced side yard setback of the Liu property. As a result, the special exception would require denial, even if the variance were approved.

CONCLUSION:

Accordingly, for the above reasons, the requested variance and special exception are denied.

Date: June 2, 2004

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner